No. 78-806

In the Supreme Court of the United States

OCTOBER TERM, 1978

A. BURTON HANKINS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. A41-A62) is reported at 424 F. Supp. 606. The opinion of the court of appeals (Pet. App. A1-A20) and its clarifying opinion denying a petition for rehearing (Pet. App. A21-A40) are respectively reported at 565 F.2d 1344 and 581 F.2d 431.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1978, and the court denied rehearing

on October 3, 1978 (Pet. 2). The petition for a writ of certiorari was filed on November 15, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compulsory self-incrimination bars enforcement of an internal revenue summons requiring production of records held by a person in the representative capacities of a partner in a partnership and an executor of an estate.

2. Whether the decision below correctly held petitioner in contempt for refusing to obey an order enforcing an internal revenue summons requiring production of records that petitioner acknowledged were in his possession.

STATEMENT

In 1957, petitioner and his brother formed a partnership known as Hankins Lumber Company. The partnership continued until the death of petitioner's brother in 1971. The business was thereafter continued and incorporated in 1973. In 1975, the Internal Revenue Service issued summonses to petitioner requiring the production of the books and records of Hankins Lumber Company, records relating to the administration of the estate of petitioner's brother, and an audit report of the Hankins Lumber Company and associated workpapers prepared by a certified public accountant for the widow of petitioner's brother for use in a will contest. Petitioner refused to comply

with the summonses on the ground that his Fifth Amendment privilege against compulsory self-incrimination barred production of the records. In this enforcement proceeding brought by the government in the United States District Court for the Northern District of Mississippi, petitioner took the position that the records sought by the summonses were his personal property and that he and he alone had custody and control of the records summoned (I-R. 23, 24, 35, 339, 340, 392).[1] At the hearing in the district court, petitioner's counsel acknowledged that petitioner was in possession and control of all the records (I-R. 59).[2]

The district court found that all of the records sought by the summonses were either created by or obtained by petitioner in a representative capacity—either as a partner in the lumber company or as executor of his brother's estate. It accordingly rejected petitioner's Fifth Amendment claim (Pet. App. A48, A59-A62). The court entered final orders of enforcement on August 11, 1976, and both the district court and the court of appeals denied stays pending appeal. On September 27, 1976, petitioner produced

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[1] "I-R." refers to the record appendix filed in the court of appeals relating to the internal revenue summonses. "II-R." refers to the record appendix filed in the court of appeals relating to the order holding petitioner in contempt.

[2] As to corporate workpapers also summoned and in the possession of petitioner's accountant, petitioner asserted under oath that he was not in possession of those papers (I-R. 338). Accordingly, no further attempt was made to obtain those papers from petitioner.

certain ledgers and journals of the Hankins Lumber Company. However, examination of those books revealed that certain critical pages of the sequentially numbered books had been removed and were not produced. Petitioner also produced what purported to be the "Boswell audit papers" and the records of the estate of petitioner's brother. But examination of those records likewise revealed that they did not contain the requested audit reports or workpapers, and that the estate administration file contained only copies of records already on file with the chancery (probate) court (II-R. 60-71).

The government thereupon sought an order from the district court compelling petitioner to show cause why he should not be held in contempt for refusing to comply with the court's order of August 11, 1976. In its petition, the government described in detail the records not produced by petitioner. In response, petitioner claimed that he was unable to produce the records.[3] At the return of the show cause order, the government established that the court had ordered petitioner to produce the records, that petitioner had not produced all the records, and that petitioner had offered no justification for his refusal to produce the records. The government showed that the pages missing from the books of Hankins Lumber Company were not random pages, but had been systematically removed from the books so as to make the pages produced useless (II-R. 69-70).

[3] Unlike his responses to the petition to enforce the summonses, petitioner's response to the government's petition for contempt was not verified under oath (II-R. 29).

Petitioner presented no defense nor any evidence attempting to show cause why he should not be held in contempt.[4] After observing that it was "inconceivable" that petitioner did not have possession of and control over the records, the district court held petitioner in contempt and ordered him incarcerated until such time as he produced the records (II-R. 101, 35).

The court of appeals affirmed as to the summons enforcement and contempt orders (Pet. App. A1-A40). In its first opinion (Pet. App. A1-A20), the court rejected petitioner's Fifth Amendment claim (Pet. App. A10-A15). It also upheld the contempt order on the ground that there was no evidence to support petitioner's contention that he could not produce the records (Pet. App. A18-A19).[5]

[4] Petitioner did offer to take the stand in order to assert that he could not produce the records if he were not subjected to cross-examination. The court ruled, however, that petitioner would be subject to cross-examination if he elected to testify. Petitioner thereupon declined to take the stand (II-R. 84-86).

[5] In its supplemental opinion issued upon the denial of a petition for rehearing, the court of appeals reaffirmed its earlier decision (Pet. App. A21-A40). Following an extensive examination of Mississippi law (Pet. App. A26-A34), the court of appeals again concluded (Pet. App. A34) that the records of the lumber company were not petitioner's personal papers but the papers of a partnership held by petitioner in a representative capacity. The court also reaffirmed (Pet. App. A34-A36) its earlier ruling that the district court properly held petitioner in contempt.

ARGUMENT

1. Petitioner argues (Pet. 20-21) that a revenue agent and a government attorney stated that Hankins Lumber Company was operated as a sole proprietorship during 1972, and that the summons should not have been enforced with respect to the records for that year. But, contrary to petitioner's assertion, the statements he cites do not constitute a concession by the government that the court of appeals was required to accept. They are at best isolated statements that do not govern the proper legal characterization of Hankins Lumber Company in 1972.[6] With respect to that question, the court of appeals correctly held (Pet. App. A12-A13, A26-A34) that during 1972, petitioner continued to operate the business and hold the records sought in the representative capacities of guardian for his brother's minor children and executor of his brother's estate. Moreover, the court concluded that the partnership did not terminate until he, the surviving partner, made an

[6] While the revenue agent characterized Hankins Lumber Company as a sole proprietorship in 1972 (I-R. 167; II-R. 122), petitioner errs in describing the government's trial attorney's statement as a concession. The full statement, which petitioner quotes only in part, was "Then when Bewel Hankins dies the partnership of course, by the operation of law, I suppose, becomes a sole proprietorship. But to further complicate the matter Mr. Burton Hankins becomes the Executor of his brother's estate and then acquires the remaining assets of the partnership" (I-R. 68).

accounting to the estate and to the heirs under Mississippi law.[7] This question, which turns largely upon state law, does not warrant further review.

2. Contrary to petitioner's further argument (Pet. 24), his legal right to possession of the papers does not establish that they are his personal records protected from compulsory disclosure. This Court rejected the identical argument both in *Couch* v. *United States*, 409 U.S. 322 (1973), and in *Bellis* v. *United States*, 417 U.S. 85 (1974). Moreover, the fact that the partnership in *Bellis* was only in the process of winding up its affairs when the subpoena was served while the partnership here was completely dissolved does not, as petitioner asserts (Pet. 23), serve to distinguish that case. As the Court in *Bellis* observed (417 U.S. at 96 & n.3), the dissolution of a partnership does not give the custodian of its records any greater claim to the Fifth Amendment privilege. The critical fact is that the records in question are

[7] Petitioner further errs in contending (Pet. 21) that the government conceded on appeal that Hankins Lumber Company was a sole proprietorship in 1972. The government's brief, which petitioner again quotes only selectively, stated as follows (*id.* at 51):

> While the business was not technically being operated as a "partnership" in 1972, it was certainly not run as a sole proprietorship, but rather, was being operated by Hankins, at least in part, for the benefit of the estate and the children. With Hankins wearing so many hats, it is clear that he was operating the business in a representative capacity, as a fiduciary with responsibilities not unlike those of a trustee; and a trustee, acting in a representative capacity, has no Fifth Amendment rights in the books and records of the entity which he administers.

partnership and not personal records. See *Wheeler* v. *United States*, 226 U.S. 478 (1913); *Grant* v. *United States*, 227 U.S. 74 (1913). Accord: *United States* v. *Mahady & Mahady*, 512 F.2d 521 (3d Cir. 1975); *United States* v. *Silverstein*, 314 F.2d 789 (2d Cir. 1963).

Petitioner alternatively contends (Pet. 22) that even if the records in question are properly considered to be partnership records,[8] they should nevertheless be protected by his Fifth Amendment privilege because Hankins Lumber Company was a "small family partnership." In support of this argument, petitioner relies upon the Court's dictum in *Bellis* (417 U.S. at 101) that "This might be a different case if it involved a small family partnership * * *," citing *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y. 1972). But the *Slutsky* decision turned on the particularized facts that the two-brother partnership involved in that case conducted a family resort business and each of the family members empowered to sign checks lived on the resort premises. In these circumstances, the court concluded that the partnership represented "the purely private or personal interests of its constituents" (352 F. Supp. at 1108). Here, however, petitioner has made no showing that would assimilate Hankins Lumber Company to the close family enterprise involved in *Slutsky*.

[8] *United States* v. *Plesons*, 560 F.2d 890, 893 (8th Cir. 1977), and *United States* v. *Helina*, 549 F.2d 713, 716-717 (9th Cir. 1977), upon which petitioner relies (Pet. 20), are distinguishable since neither case involved partnership records or documents held in a representative capacity.

At all events, as this Court subsequently stated in *Fisher* v. *United States*, 425 U.S. 391, 408 (1976), upon which the court of appeals relied (Pet. App. A12), the general rule is that "neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds [citing *Bellis*]." Accordingly, the continuing validity of the decision in *Slutsky* itself is not free from doubt, and there is no need for this Court to consider whether the rationale of that decision should be extended beyond its peculiar facts. See also *United States* v. *Mahady & Mahady*, *supra*; *United States* v. *Greenleaf*, 546 F.2d 123 (5th Cir. 1977).[9]

4. As for the order of contempt, petitioner asserts (Pet. 14-19) that the government failed to establish his contempt by clear and convincing proof or that he had the ability to comply with the court's order. But the conclusion of both courts below was that petitioner could comply with the order of the district court but refused to do so. Moreover, in a contempt proceeding, the government only has the burden of

[9] Petitioner also argues (Pet. 24-25) that the mere act of producing the papers will admit their existence and authenticate them and thus constitute a testimonial act. But it is well established that production of records held in a representative capacity is not protected by the Fifth Amendment. *Curcio* v. *United States*, 354 U.S. 118 (1957); *Fisher* v. *United States*, *supra*. As the Court noted in *Fisher* (425 U.S. at 409-414), the compelled production of records which, as here, can be authenticated by others does not involve testimonial compulsion. See also, *United States* v. *Beattie*, 522 F.2d 267, 276 (2d Cir. 1975), cert. denied on this issue, 425 U.S. 970 (1976).

proving a reasonable basis for belief that the alleged contemnor has the ability to comply and that he failed to comply with the production order. *McPhaul* v. *United States*, 364 U.S. 372, 376 (1960); *United States* v. *Fleischman*, 339 U.S. 349, 362-363 (1950); *United States* v. *Hansen Niederhauser Co.*, 522 F.2d 1037 (10th Cir. 1975); *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973); *Angiulo* v. *Mullins*, 338 F.2d 820, 822 (1st Cir. 1964). Once that showing is made, the burden shifts to the contemnor to "present some evidence to explain or justify his refusal" to comply. *McPhaul*, *supra*, 364 U.S. at 379 (citing *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934)); *United States* v. *Bryan*, 339 U.S. 323, 330-331 (1950); *Hodgson* v. *Hotard*, 436 F.2d 1110, 1114 (5th Cir. 1971); *Angiulo* v. *Mullins*, *supra*.

Here, the government met its burden by pointing to the previous production order and the district court's finding that petitioner was in possession of the records sought, and introducing testimony that the records were not produced less than one month after that order and findings were entered. The government further showed that petitioner had offered no explanation for failing to produce and that the records removed from the books of account were systematically removed in such a manner as to render the records produced "gibberish" from an accounting standpoint. In response to this proof, petitioner presented no evidence.

Thus, petitioner did not even establish an inability to comply with the production order, much less make the requisite showing that his conduct did not give rise to that inability and that he had made "in good faith all reasonable efforts to comply." *United States* v. *Ryan*, 402 U.S. 530, 534 (1971); *United States* v. *Bryan*, *supra*, 339 U.S. at 330-331; *United States* v. *Swingline, Inc.*, 371 F. Supp. 37, 45 (E.D. N.Y. 1974).[10]

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[10] Petitioner further asserts (Pet. 14-15) that the district court erred in refusing to permit him to take the stand and testify that he was unable to comply with the production order and then rely on his privilege against self-incrimination to preclude cross-examination. Petitioner failed, however, to demonstrate that he could make the requisite showing only by his own testimony or that he could not, in fact, produce the records sought.

Petitioner's reliance (Pet. 11, 13) upon *Curcio* v. *United States*, 354 U.S. 118, 128 (1957); *Traub* v. *United States*, 232 F.2d 43 (D.C. Cir. 1955); and *United States* v. *Patterson*, 219 F.2d 659 (2d Cir. 1955), is misplaced. In those cases, the government called the party claiming the benefits of the privilege against self-incrimination as a witness before either a grand jury or a congressional committee, and in each instance, the order holding that party in contempt for failing to answer questions asked by the questioning authority was reversed. Here, the government did not call petitioner as a witness, and there was no requirement that it do so. The ruling of the district court as to which petitioner complains (Pet. 14-15)—that petitioner, if he voluntarily testified, would have waived the privilege as to those matters testified to on direct examination—is consistent with the established rule that any witness who voluntarily takes the stand on his own behalf waives the privilege as to relevant questions asked on cross-examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958); *United States* v. *Worth*, 505 F.2d 1206 (10th Cir. 1974), cert. denied, 420 U.S. 964 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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